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Supreme Court of the United States

OCTOBER TERM, 1962

No. 1065

HALLIBURTON COMPANY
and
CONTINENTAL CASUALTY COMPANY,
Petitioners

versus

NORTON DRILLING COMPANY
and
LIBERTY MUTUAL INSURANCE COMPANY,
Respondents

PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners seek certiorari to review the judgment of the Court of Appeals for the Fifth Circuit, affirming dismissal of petitioners' third-party complaint for failure to state a claim upon which relief can be granted; and, in support of their petition, respectfully show:

Opinions Below and Jurisdiction

The District Court rendered no opinion. The original opinion of the Court of Appeals (Judge Rives dissenting) is reported at 302 F2d 431, and its opinion deny-

ing petitioners' application for rehearing *en banc* (Judge Rives again dissenting) is reported at 313 F2d 380. These opinions are printed in the Appendix hereto.

The judgment of the Court of Appeals is dated April 25, 1962, and was entered the same date. Rehearing was denied on January 30, 1963. Jurisdiction of this Court lies under 28 USC 1254(1).

Questions Presented

This is a civil tort action for personal injury. In his complaint, the plaintiff, a maritime worker, asserts that he is a seaman. The defendants (petitioners herein) filed a third-party complaint against the plaintiff's employer seeking indemnity against the plaintiff's claim. One of the grounds asserted for indemnity was that the plaintiff's injury was proximately caused by his employer's primary, active negligence, and any negligence on the original defendants' part was passive only.

Dismissal of the third-party complaint below presents the following questions for decision by this Court:

I

Whether a third-party complaint, seeking non-contractual indemnity from an active tort-feasor against the plaintiff's tort claim, should, as held by the Court of Appeals in this case, be dismissed on motion on the ground that "the pleadings manifest no distinction, in the kind or degree of negligence" asserted by the

plaintiff against the defendant, from that asserted by the defendant against the third-party defendant,

or, to the contrary,

Whether, as held by another panel of the same Court nine months earlier, the viability of such a third-party complaint should not instead be tested with reference, not to what the pleadings say as to the kind and degree of the respective parties' negligence, but to what the evidence may ultimately show in that regard.

II

Whether Section 5 of the Longshoremen's and Harbor Workers' Compensation Act (33 USC 905) forecloses assertion of a third-party indemnity claim by a defendant against the employer of a plaintiff suing as a seaman for personal-injury damages.

As to Question I, the basis for the Fifth Circuit's affirmance of a third-party dismissal on motion in this case—that the viability of a third-party complaint should be tested, on motion to dismiss, by analysis and comparison of the allegations as to negligence contained in the plaintiff's, and in the third-party, complaints—is directly contrary to the holding, by another panel of the same Court nine months earlier, in reversing dismissal of the same type of third-party complaint on motion, that the viability of such a third-party complaint is to be determined with reference

not to the bare averments of the pleadings, but to the fact situations which may be developed on trial. *Travelers Insurance Co. vs Busy Electric Co.*, 294 F2d 139 (1961).[1]

This dichotomy of approach to the question whether a third-party complaint for tort indemnity states a claim for relief, represents not only an intra- but also an inter-Circuit conflict: The construction-of-pleadings basis for decision adopted by the Court of Appeals in this case, is supported by the Tenth Circuit's decision in *Peak Drilling Co. vs Halliburton Oil Well Cementing Co.*, 215 F2d 368 (1954); whereas the await-the-facts basis for decision adopted by the Court in the *Busy Electric* case, is in accord with the Third Circuit's decision in *Gartner vs Lombard Bros.*, 197 F2d 53 (1952).[2]

The construction-of-pleadings approach seems clearly contrary to this Court's holdings that, under the Civil

[1] The Court in this case consisted of Judges Tuttle, Rives and Wisdom. Judge Tuttle wrote the opinion of the Court and Judge Rives dissented. In the earlier case the Court consisted of Judges Cameron, Brown and Wisdom. Judge Brown wrote the opinion of the Court and Judge Cameron dissented on another point. Judge Wisdom concurred in both decisions, but wrote the prevailing opinion in neither.

[2] Reversing dismissal of such a third-party complaint on motion, the Third Circuit pointed out that "if the facts, as developed, could show both Lombard and DuPont to be tort-feasors and both 'primarily' liable, it could well be that the case would be one for contribution . . . . Until we know what the facts are, we cannot possibly know whether the danger of collision in nondirected traffic on these premises was an open danger or not . . . All we know is what we are told in the above paragraph of the third-party complaint. Upon a trial of the facts there may or may not be made out a case whereby DuPont can be compelled to contribute to Lombard." 197 F2d at 55-56.

Rules, a complaint need do no more than set forth a claim and give the respondent fair notice of its basis; that the facts on which the claim is based need not be pleaded; and that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief". *Conley vs Gibson*, 355 US 41, 47-48 (1957); *United States vs Employing Plasterers Association*, 347 US 186, 188-89 (1954).[3]

As to Question II, the Court of Appeals held petitioners' indemnity claim foreclosed on the additional ground that "the applicable workmen's compensation statutes have completely abolished an employer's tort liability for injuries to his employees". 302 F2d at 434; Appendix, page 24 below. If the plaintiff is a seaman as he asserts (R 27), this holding is directly contrary to the holding by another panel of the Fifth Circuit that a seaman is not covered by any workmen's compensation law. *Kibadeaux vs Standard Dredging Co.*, 81 F2d 670 (CA 5-1936), cert. den., 299 US 549; see also *Norton vs Warner Co.*, 321 US 565 (1944). If the plaintiff is not a seaman, but a mere maritime worker, this holding by the Court of Appeals herein conflicts with this Court's subsequent intimation that the Longshoremen's and Harbor Workers' Compensation Act does not foreclose a tort indemnity claim against a

[3] The same rules of pleading govern original and third-party complaints. 3 *Moore's Federal Practice* (2d ed.) 417, ¶14.07; *Travelers Insurance Co. vs Busy Electric Co.*, 294 F2d 136 (CA 5-1961); *LaFerry vs Ajax Truck Rentals*, 161 FS 707 (ED Tenn.-1958).

personal injury plaintiff's employer. *Weyerhaeuser S. S. Co. vs United States*, 31 US Law Week 4331 (1963).

Rule and Statute Involved

Rule 14(a), Federal Rules of Civil Procedure: "When Defendant May Bring In Third Party. Before the service of his answer a defendant may move *ex parte* or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is now or may be liable to him for all or part of the plaintiff's claim against him. . . ."

Section 5, Longshoremen's and Harbor Workers' Compensation Act: "The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death . . ." 33 USC 905; 44 Stat. 1426.

Statement of the Case

Adam J. Sims brought this civil action against petitioners, Halliburton Company and its liability insurer, to recover damages for injuries he sustained while employed by respondent, Norton Drilling Company, aboard its submersible drilling barge. Federal jurisdiction was based on diversity of citizenship. R 2.

Sims's complaint alleges (1) that he is a seaman (R 2), and (2) that the drilling barge was operating in

navigable waters of the United States, when the chain bridle of a cementing head furnished by Halliburton parted, causing him to fall while he was exerting strain with a derrick on the barge in an effort to lift the head. R 3-4.

Liability of petitioners was predicated on the averment that "all of the foregoing proximately resulted from" Halliburton's negligence "with respect to the manufacture, maintenance, upkeep and repair" of the cementing head, and Halliburton's negligent failure "to furnish reasonably proper tools and appliances and to warn the plaintiff . . . of the dangers inherent therein". R 4-5.

Petitioners filed a third-party complaint against Norton, for indemnity against Sims's claim. R 10. The third-party complaint alleges that Norton had undertaken to remove the cementing head with its employees and equipment, and that the accident was proximately caused by Norton's primary, active negligence, and by its violation of its implied warranty to remove the head in a workmanlike manner. R 12.

The non-contract claim of indemnity was based on the familiar principle that if harm results from the negligence of two tortfeasors, the fault of one being active or primary, and the fault of the other being passive, secondary or merely technical, the passive is entitled to indemnity from the active tortfeasor for any resultant damages it may have to pay. *Cf.* Restate-

ment, *Restitution*, Chapter 3, Topic 3; *Washington Gas Light Co. vs. District of Columbia*, 161 US 316 (1896).

Norton and the other respondent (Norton's workmen's compensation insurer, which had intervened for reimbursement out of Sims's recovery, R 6-9) moved to dismiss the third-party complaint for failure to state a claim upon which relief can be granted. R 16.

The District Court granted the motion; and its judgment of dismissal was affirmed by a divided Court of Appeals (Judge Rives dissenting).

On the basis of a stated conflict between the Court of Appeals' decision, and the decision on the same question by another panel of the same Court nine months earlier, petitioners applied for a rehearing *en banc*. This application was denied by the same panel (Judge Rives again dissenting) on January 30, 1963, more than nine months after the original opinion was handed down.

The original opinion of the Court of Appeals was based, as to dismissal of petitioner's non-contract indemnity claim (to which the Court referred as the "active-passive negligence dichotomy"), on the fact that "the pleadings manifest no distinction in the kind or degree of negligence asserted against Halliburton and Norton. Sims, the plaintiff, seeks to hold Halliburton for furnishing defective equipment. Halliburton charges that Norton was negligent in handling this equipment. Both parties, therefore, are charged with

active and affirmative negligence." 302 F2d at 434; Appendix, page 24 below.

The Court's original opinion did not cite the Fifth Circuit's contrary decision rendered on July 17, 1961 (while the Court had this case under advisement) in *Travelers Insurance Co. vs Busy Electric Co.*, 294 F2d 139, although that decision also dealt with the propriety of dismissal on the pleadings of a third-party tort-indemnity complaint, and although petitioners had filed a brief calling the Court's attention to the *Busy Electric* decision and urging it as dispositive of the issues in this case.

Since petitioners' application for a rehearing *en banc* was based on the conflict, in principle and result, between the Fifth Circuit's decisions in this case and in *Busy Electric*, reference was made to the latter decision in the opinion denying the application for rehearing in this case. That opinion (Judge Rives again dissenting) denied the existence of any conflict between the two decisions, on the basis, as to the non-contract indemnity claim, of an asserted distinction between the pleadings in the two cases. But this attempted distinction, in addition to being unreal, emphasizes, instead of reconciling, the conflict in the principles on which the two decisions were based.

The distinction sought to be drawn is simply that in *Busy Electric* the plaintiff charged the defendant with "failing to maintain the aforesaid pole in safe condition, which maintenance was the responsibility of the"

defendant; whereas in this case plaintiff Sims charged Halliburton with negligence "with respect to the manufacture, maintenance, upkeep and repair of the said cementing head and its appurtenances". The opinion denying rehearing construes the *Busy Electric* charge of "failing to maintain", as a charge of "technical or constructive" fault for which the defendant would be entitled to indemnity; but concludes that Sims's charge in this case, of negligence as to "manufacture, maintenance, upkeep and repair" is a charge of active fault for which Halliburton "would have no cause of action over against Norton". 313 F2d at 381; Appendix, page 43 below.

Not only is the postulated distinction no distinction at all, but it underlines the construction-of-pleadings basis of the decision in this case, as contrasted with the contrary await-the-facts basis for the *Busy Electric* decision.

An additional ground for the Court of Appeals' decision herein was the holding "that the applicable workmen's compensation statutes have completely abolished an employer's tort liability for injuries to his employees". 302 F2d at 434; Appendix, page 24 below.

Argument

Question I

The conflict between the decision below, and that of another panel of the same Court only nine months

earlier in *Travelers Insurance Co. vs Busy Electric Co.*, (294 F2d 139), is patent.

This case and the *Busy Electric* case both involve the identical question whether a defendant, sued for recovery of damages for personal injury on the ground of negligence, may implead the plaintiff's employer for indemnity. In both cases, the plaintiff charged the defendant with negligence in the maintenance of equipment (a light pole in *Busy Electric*, a chain in this case) and in both cases, the defendant's third-party complaint charged the employer with negligence in handling the defective equipment. Both third-party complaints were dismissed in the trial court on the basis of the pleadings alone.

The dismissal was reversed in *Busy Electric*, on the ground that a third-party complaint should not be dismissed, regardless of the allegations in the original complaint, if there is any reasonable possibility that facts may be developed at the trial under which the defendants, if cast, might be entitled to indemnity from the employer.

Contrary to that holding in *Busy Electric*, the same Court affirmed dismissal of the impleader in this case, on the ground, not that facts might not be developed at the trial entitling the defendants to indemnity, but that, under the allegations of the plaintiff's complaint, no claim is asserted against the defendants for which the latter, if cast, might be entitled to indemnity from the employer.

The divergence of the Court's approach to the two cases is clearly evident from its opinions. In this case, petitioners' argument that circumstances may be shown at the trial under which the employer, as the active tortfeasor, would owe indemnity to the defendants guilty of only passive negligence, was dismissed for the reason that "*the pleadings* manifest no distinction in the kind or degree of negligence *asserted against*" the defendants and the employer. 302 F2d at 434; Appendix, page 24, below. (Emphasis supplied.)

But in *Busy Electric*, the Court rejected an approach based on the allegations of the pleadings: "Busy Electric (the third-party defendant) apparently persuaded the Court to read the pleadings as though that was all there was to the case. Of course, as we have so many times pointed out, this is not the test. . . . 'In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" 294 F2d at 143.

In its opinion in this case, the Court goes on to state that "Sims, the plaintiff, seeks to hold Halliburton for furnishing defective equipment. Halliburton charges that Norton was negligent in handling the equipment. Both parties, therefore, are charged with active and affirmative negligence", so that, under the pleadings, Norton could owe no indemnity, as the

active tortfeasor, to a merely passively negligent Halliburton. 302 F2d at 434; Appendix, page 24 below.

But in *Busy Electric* the Court said: "Busy Electric . . . overcomes this by again emphasizing the literal words of Schomaker's complaint which charges negligence of HANO 'through their agents or employees, in failing to maintain the * * * pole in safe condition * * *.' This, it asserts, demonstrates positively that the plaintiff's demand is not, as in Appalachian, based upon constructive or technical fault. But until the facts are established, how do we know whether this amounts to 'affirmative' or 'active' fault or, as contended by HANO, merely the assertion of a liability based on the landowner's pervasive duty to keep the premises in good repair?" 294 F2d at 145.

The conflict between the two panels of the Fifth Circuit is underlined by the attempted reconciliation of the decisions, in the opinion denying rehearing in this case. The unreal distinction which that opinion seeks to draw between the charge of "passive" negligence in "failing to maintain" in *Busy Electric*, and the charge of "active" negligence "with respect to the manufacture, maintenance, upkeep and repair" in this case, succeeds only in emphasizing the sterile construction-of-pleadings basis for the decision in this case, as contrasted with the preferable fact basis for the *Busy Electric* holding.

Such an intra-Circuit conflict, especially when it mirrors an inter-Circuit conflict as this one does,[4] calls for resolution through this Court's certiorari power when the question at issue is important. *Dickinson vs Petroleum Conversion Corp.*, 338 US 507 (1950); *John Hancock Ins. Co vs Bartels*, 308 US 180 (1939).

The present intra-Circuit conflict between decisions handed down only nine months apart, leaves all of the District Judges in the Fifth Circuit without guidance as to the standards on which motions to dismiss third-party tort-indemnity complaints are to be decided. Given the complex inter-relations of the modern industrial world, hardly any tort claims now result solely from the act of a single entity, and hardly any tort suits can be decided with reference to the liability of a single tort-feasor. Almost every such suit involves indemnity or contribution claims by the original defendant against a supplier, manufacturer, owner, custodian, operator or other person having some measure of responsibility for the equipment or situs giving rise to the injury.[5] Tort

[4] Compare *Peak Drilling Co. vs Halliburton Oil Well Cementing Co.*, 215 F2d 368 (CA 10-1954), in which, as in this case, a third-party tort-indemnity complaint was dismissed on the ground that the negligence alleged against the defendant was not of a type for which the latter would be entitled to indemnity, with *Gartner vs Lombard Bros.*, 197 F2d 53, 55 (CA 3-1952), which reversed dismissal of such a third-party complaint on motion, on the ground, as in *Busy Electric*, that the viability of the third-party claim could be determined only when "we know what the facts are".

[5] The volume and significance of this branch of litigation would seem to be sufficiently demonstrated by the fact that in the limited sphere of the shoreworker-shipowner-contractor relationship alone, this Court has had occasion, in recent years, to decide important third-party tort-indemnity questions in *Waterman Co. vs Dugan & McNamara*, 364 US 421 (1960), *Crumedy vs The J. H. Fisser*, 358 US 423 (1959).

actions account for almost half of the private litigation in the Federal Courts.[6]

Further, by going counter to this Court's repeated holding that a complaint is not to be dismissed on motion on the basis of the allegations contained therein (the purpose of which is merely to give notice of the type and basis of the plaintiff's claim, not to set forth facts or theories constituting a cause of action[7]), but only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief",[8] the judgment below visits substantial injustice on petitioners, and disrupts the orderly process of the Federal judicial system.

At worst, the judgment below may have *res judicata* effects depriving the petitioners, solely on the basis of

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Weyerhaeuser S. S. Co. vs Nacirema Co., 355 US 563 (1958), *Ryan Co. vs Pan-Atlantic Corp.*, 350 US 124 (1956), *Halcyon Lines vs Haenn Ship Corp.*, 342 US 282 (1952), and *American Stevedores vs Porello*, 330 US 446 (1947).

[6] Administrative Office of the United States Courts, Annual Report of the Director (1962), Table C3.

[7] *Dioguardi vs Durning*, 139 F2d 774 (CA 2-1944). "We have repeatedly said that under the Federal rules . . . a complaint may not be dismissed under Rule 12(b)(6) for a failure to state a claim upon which relief can be granted if under any theory of recovery a case for relief can be made out by the proof." *Mannings vs Board of Public Instruction*, 277 F2d 370, 372 (CA 5-1960).

[8] *Conley vs Gibson*, 355 US 41, 45-46 (1957); *United States vs Employing Plasterers Association*, 347 US 186 (1954). "'Under the Rules of Civil Procedure a case consists not in the pleadings but the evidence, for which the pleadings furnish the basis. Cases are generally to be tried on the proofs rather than the pleadings.'" *Des Isles vs Evans*, 200 F2d 614, 616 (CA 5-1952). "Litigation is not an art in writing nice pleadings. It can and should seldom be settled on its merits at the pleading stage unless the parties are agreed upon the facts. . . . In the federal courts very few *contested cases* are settled on the pleadings." 2 *Moore's Federal Practice* (2d ed.) 1611, ¶8.02.

the plaintiff's allegations over which they have no control," of the entirety of any indemnity rights to which the facts may ultimately show them to be entitled against the respondents. *Cf. Nagler vs Admiral Corporation*, 248 F2d 319, 322 (CA 2-1957).

At best, the petitioners will be relegated to the expense and delay of an independent indemnity action against the respondents after this action has terminated, burdening the already-overburdened judiciary and public fisc with the unnecessary expense and loss of time attendant on two trials where one would suffice, subjecting all concerned to the risk of inconsistent fact findings in the two cases, and defeating the whole purpose of the third-party procedure which is "to avoid two actions which should be tried together to save the time and cost of a reduplication of evidence, to obtain consistent results from identical or similar evidence, and to do away with the serious handicap to a defendant of a time difference between a judgment against him, and a judgment in his favor against the third-party defendant". 3 *Moore's Federal Practice* 412, ¶14.04.

And, as noted above, these unsuitable results are reached, not even on the basis of the petitioners' own pleading, but on the basis of the plaintiff's conclusionary

[9] "Appellant's claim based on the active-passive negligence dichotomy is clearly without merit. For one thing, the *pleadings* manifest no distinction in the kind or degree of negligence *asserted* against Halliburton and Norton. *Sims, the plaintiff, seeks to hold Halliburton for furnishing defective equipment.* Halliburton charges that Norton was negligent in handling this equipment. Both parties, therefore, are *charged* with active and affirmative negligence." 302 F2d at 434; Appendix, page 24 below. (Emphasis supplied.)

allegations for which the petitioners have no responsibility and by which not even the plaintiff himself will be bound on trial.[10]

Nor can respondents contend that the alternative to denial of their motion to dismiss, will be their subjection to the expense of participation in a trial with which they have nothing to do. If, under the undisputed facts, the respondents have no liability to petitioners, respondents are free to develop and present the facts by discovery or affidavits, and obtain dismissal of the third-party complaint by summary judgment. *United States vs Employing Plasterers Association*, 347 US 186, 189 (1954). But if there is a genuine fact issue as to respondents' liability to petitioners, it should be determined by trial, not by attempted exegesis of conclusionary allegations in another party's notice pleadings.

Question II

The alternative basis for the Court of Appeals' decision—the holding that "the applicable workmen's compensation statutes have completely abolished an employer's tort liability for injuries to his employees" (302 F2d at 434; Appendix, page 24 below)—runs directly counter to the holding, by another panel of the same Court, that a seaman (as the plaintiff alleges himself to be, R 2) is not covered by any workmen's compensation law. *Kibadeaux vs Standard Dredging Co.*, 81

[10] See 6 *Moore's Federal Practice* (2d ed.), ¶54.62. "After trial judgment must be given according to the right of the case, whether the correct legal theory has been presented or not, Rules 15(b) and 54(c)". *Atwater vs North American Coal Corp.*, 111 F2d 125, 126 (CA 2-1940), Clark, J., concurring.

F2d 670 (CA 5-1936), cert. den., 299 US 549; and see *Norton vs Warner Co.*, 321 US 565 (1944).

If the plaintiff is a maritime worker rather than a seaman, then the Court of Appeals' holding conflicts with this Court's plain intimation (subsequent to the Court of Appeals' disposition of this case) that the applicable Longshoremen's and Harbor Workers' Compensation Act does not abolish an employer's tort indemnity liability to a third person sued for personal injuries to an employee caused by the employer's primary fault. *Weyerhaeuser S. S. Co. vs United States*, 31 US Law Week 4331 (1963).

Conclusion

It is respectfully submitted that, in the interest of justice, this Court should resolve the confusion-engendering intra- and inter-Circuit conflicts at issue, establish with finality the standards by which third-party tort-indemnity complaints are to be tested, and obviate the unjust and disruptive result reached below, by granting certiorari herein, with either remand to the Court of Appeals for a rehearing *en banc*[11] or direct reversal of the judgment below either summarily[12] or after plenary hearing.

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[11] *Cf. United States vs Johnston*, 316 US 649 (1941).

[12] In other cases, this Court has disposed of questions of pleading and practice by grant of certiorari and summary reversal. *Jung vs K. & D. Mining Co.*, 356 US 335 (1958); *United States vs Arizona*, 346 US 907 (1953); *Ewing vs Gardner*, 341 US 321 (1951).